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# Larry Wayne Keyes v. Commonwealth of Kentucky

Appellee's Brief 1976-SC-0012

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# **APPELLEE'S BRIEF**

550 S.W. 2d 192

## SUPREME COURT OF KENTUCKY

FILE NO. 76-12

LARRY WAYNE KEYES

APPELLANT

V. APPEAL FROM CALDWELL CIRCUIT COURT  
HON. THOMAS B. SPAIN, JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLEE

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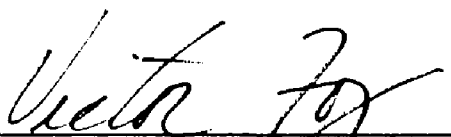
COUNSEL FOR APPELLEE

This is to certify that a copy of the foregoing Brief for Appellee has been mailed, postage prepaid, to the Hon. Thomas B. Spain, Judge, Caldwell Circuit Court, Court House, Princeton, Kentucky 42445; Hon. Albert W. Spenard, Commonwealth Attorney, 18 Court Street, Madisonville, Kentucky 42431; and Hon. Jack Emory Farley, Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601, Counsel for Appellant, this 6th day of April, 1976.

**FILED**

APR 6 1976

MARTHA LAYNE COLLINS  
CLERK  
SUPREME COURT

  
Assistant Attorney General

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SUPREME COURT OF KENTUCKY

FILE NO. 76-12

LARRY WAYNE KEYES

APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT  
HON. THOMAS B. SPAIN, JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE QUESTIONS PRESENTED

- I. WHETHER OR NOT THE COURT ERRED IN OVERRULING APPELLANT'S MOTIONS FOR DIRECTED VERDICT?
- II. WHETHER OR NOT THE PROSECUTOR'S REMARKS CONCERNING APPELLANT'S SILENCE AT TIME OF ARREST WERE SUBSTANTIAL PREJUDICE REQUIRING REVERSAL?

COUNTERSTATEMENT OF THE CASE

A. Nature of the Proceedings

Appellant and another individual were jointly indicted by the Caldwell County Grand Jury for the offense of storehouse breaking in violation of KRS 433.190 (Trial Record, hereinafter TR, pp. 1-2). Represented by counsel appellant stood trial before a jury in Caldwell Circuit Court (TR p. 32). At the close of evidence the jury returned a verdict of guilty and fixed punishment at one year in the penitentiary (TR p. 34). Appellant filed a timely notice of appeal and now prosecutes this appeal.

B. Statement of Relevant Facts

Appellant, together with other individuals, was arrested attempting to flee from Robinson's Implement Company by local

police (Transcript of Evidence, hereinafter TE, p. 156). Appellant admitted his participation in the offense but offered in his defense entrapment (TE p. 307). Additional relevant facts will be presented in the arguments below.

### ARGUMENT

#### I.

THE COURT DID NOT ERR IN OVERRULING  
APPELLANT'S MOTIONS FOR DIRECTED VERDICT.

Appellant claims that he was entitled to a directed verdict and that the case should not have been submitted to the jury. Any evidence tending to establish the accused's guilt is sufficient to take the case to the jury unless it is so palpably against the evidence as to shock the conscience. Sells v. Commonwealth, 271 Ky. 447, 112 S.W.2d 692 (1938). If there is any evidence, however slight, which tends to show guilt of the crime charged or of any lesser included offense, it is the trial court's duty to submit the question to the jury. Hack v. Commonwealth, Ky., 444 S.W.2d 877 (1968); Rogers v. Commonwealth, Ky., 444 S.W.2d 548 (1969). Further in testing whether the evidence is sufficient to allow submission, the trial judge must view the evidence in a light most favorable to the government. United States v. Milby, 400 F.2d 702 (6th Cir. 1968). Evidence of guilt was overwhelming. Appellant admitted his involvement (TE p. 307). He testified as to what his participation involved (TE pp. 305-315). In view of the evidence it cannot be said that it was error for the trial court to overrule appellant's motions.

Nevertheless, appellant contends that his motions should have been granted because of the entrapment issue. However, in

his motions appellant did not specifically apprise the court that the basis for the motion was entrapment. The reason given in the first motion was that he was indicted for breaking and entering and that the door was open and entered without any evidence of entry by force (TE p. 230). No reasons were given for the second motion (TE p. 333).

Appellee submits that the question of entrapment has not been properly preserved for appeal, RCr 9.22, and should not be considered by this Court.

Appellee, arguendo, would point out that while entrapment is a defense, it is for the jury to decide if the evidence supports the defense. United States v. Williams, 319 F.2d 479 (6th Cir. 1963). Cf. Hazel v. Commonwealth, Ky., 371 S.W.2d 635 (1963); Bagby v. Commonwealth, Ky., 424 S.W.2d 119 (1968). Merely raising the defense does not entitle one to a directed verdict. The evidence offered by appellant to support his claim was not so overwhelming and convincing as to remove the issue from the jury or require a verdict in his favor. An instruction on entrapment was given and the issue submitted to the jury for determination. This was all that he was entitled to. The jury had the right to believe or disbelieve his evidence; it chose to believe that there was no entrapment.

Appellant was not entitled to a directed verdict on the grounds that he raised at trial nor those raised on appeal.

## II.

THE PROSECUTOR'S REMARKS CONCERNING APPELLANT'S SILENCE AT TIME OF ARREST WERE NOT SUBSTANTIAL PREJUDICE REQUIRING REVERSAL.

Appellant was advised of his rights at the time of arrest (TE p. 21). He made no statement and did not claim



entrapment at that time. During the closing argument the prosecutor commented on this silence (TE pp. 376-377). Appellant claims this was error requiring reversal of his conviction. Even though appellant admits no objection was made at that time, he asks this Court to use its extraordinary power and consider this issue because his substantial rights have been prejudiced. RCr 9.26.

In view of this Court's previous rulings in Cessna v. Commonwealth, Ky., 465 S.W.2d 283 (1971) and Niemeyer v. Commonwealth, Ky., \_\_\_ S.W.2d \_\_\_ (rendered February 6, 1976), appellee is constrained to agree that this Court should consider the issue.

While the prosecutor's remarks were improper and involve appellant's constitutional rights, such errors are not necessarily prejudicial thus requiring reversal. Harrington v. California, 395 U.S. 250, 23 L.Ed.2d 284, 89 S.Ct. 1726 (1969); Watkins v. Commonwealth, Ky., 465 S.W.2d 235 (1971). To determine whether an error is prejudicial the Court must consider the whole case if there is a substantial possibility the result would have been different. RCr 9.26; Abernathy v. Commonwealth, Ky., 439 S.W.2d 949 (1969).

In Niemeyer, supra, the Court set criteria to aid in such a determination. Two important circumstances are the weight of the evidence and the degree of punishment fixed by the verdict. Appellee submits that the evidence of appellant's guilt was overwhelming, his argument to the contrary notwithstanding. He was arrested as he ran from the building (TE p. 316) and he admitted that he had gone into the building (TE p. 317). As discussed in the previous argument, his defense was entrapment, which the jury chose not to believe. The penalty imposed was the minimum, a point that appellant uses to attempt to show prejudice.

Appellee submits that when the jury chose not to believe appellant was entrapped, the evidence of guilt was so overwhelming they indicated a total absence of prejudice by giving the minimum sentence.

Appellant's argument also cites Hale v. United States, 422 U.S. 171, 45 L.Ed.2d 99, 95 S.Ct. 2133 (1975) and Minor v. Black, \_\_\_ F.2d \_\_\_ (6th Cir. 1975) (decided December 8, 1975). Hale was decided by the Supreme Court using its supervisory powers over the federal courts. That decision is not binding upon the states, though the language therein does condemn the use of a defendant's silence as evidence. In Minor, supra, No. 74-2242 at 8, the court recognized the principle that using pre-trial silence may on occasion be harmless error, but to be harmless it must be shown absent the error no juror could have entertained a reasonable doubt as to guilt. In granting Minor's petition Judge Peck wrote:

"We hold that the instant cross-examination and closing argument was error of constitutional magnitude because, petitioner's silence not being sufficiently inconsistent with his trial testimony to permit the use of that silence to impeach his testimony, the admission of evidence of and comment on such silence violated petitioner's right to remain silent." Minor, supra, at p. 4.

Appellee submits that in addition to the weight of evidence, appellant's silence was sufficiently inconsistent with his trial testimony to permit comment. For this and the reasons stated above there was no prejudicial error requiring reversal.

#### CONCLUSION

For the foregoing reasons appellee submits that there were no reversible errors committed at appellant's trial and the judgment of the Caldwell Circuit Court should be affirmed.

Respectfully submitted,

ROBERT F. STEPHENS  
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A handwritten signature in dark ink, appearing to read "Victor Fox", written in a cursive style.

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